ENVIRONMENTAL LAWS VS. PROPERTY RIGHTS

Nuisance Law as a Test for Just Compensation

I. INTRODUCTION

The needs of the public and the desire to own private property are in constant tension. In June 1990, after environmentalists sued to add the Northern Spotted Owl to the list of endangered species, the Fish & Wildlife Service promulgated regulations requiring timber companies to leave at least 40 percent of the old-growth forests intact within a 1.3 mile radius of any spotted owl nest or activity site.1 The timber industry protested that the regulation would cost thousands of jobs, while the environmentalists argued that society has a fundamental obligation to protect endangered species and their habitats.2 The author’s own home town of Cottage Grove, Oregon suffered considerably when spotted owl conservation efforts forced closure of the lumber mill upon which the town depended.3

In the United States, the right to private property is ostensibly protected by the Fifth Amendment, which provides that “no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”4 However, the Fifth Amendment has not prevented the government from narrowing the scope of private property rights by promoting various environmental causes.5 The

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4 U.S. CONST. amend. V.
5 See infra Section VI.
Supreme Court, long sympathetic to government prerogatives, has used several doctrines to prevent most regulatory takings claims from receiving compensation under the Fifth Amendment. Carver examination of the Supreme Court’s takings doctrines shows that the Supreme Court lacks a rigorous intellectual system for analyzing takings cases, resorting instead to “essentially ad hoc, factual inquiries.” The result, discussed in Section II, is a regulatory takings jurisprudence that has eroded private property rights.

However, the law of regulatory takings may soon change. Several barriers to claiming compensation, described in Section III, are crumbling. Turnover on the Supreme Court could swiftly see the formation of a new property-friendly majority that might reformulate takings jurisprudence and curtail the expansive influence of some environmental laws that are hostile to private property. When the last arbitrary barrier to property rights litigation falls, the Court should fully embrace the rule in Lucas v. South Carolina Coastal Council that only a nuisance or a similar “background principle” of law inuring to title that originated before the Fifth Amendment or award of the original title can serve to deny just compensation.

Section IV describes background principles of property that legitimately prevent compensation.

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9 See infra Section III-A.
10 See infra Section III.

Since many environmental laws, such as the Endangered Species Act, are grounded upon nuisance regulation, a set of factors is needed to determine whether a given government action legitimately prevents a bona fide nuisance. Section V presents a five-part test to distinguish bona fide nuisances from spurious nuisances. Section VI applies those factors to the Endangered Species Act (ESA), reasoning that two provisions of the ESA unconstitutionally take private property for public use without compensation. Section VII emphasizes that this nuisance framework would not invalidate the ESA, only require that the public at large bear the cost. The ESA can be made compatible with the basic human necessity to own property.

II. BACKGROUND OF PRIVATE PROPERTY RIGHTS

Just as animals fight over food, burrows, and territory to survive, possessions are necessary for human survival. As Sir William Blackstone observed in his Commentaries on the Laws of England, protection of private property is necessary for public order; otherwise, one would expend considerable effort planting a field only to see it confiscated by others. Property “belongs” to anyone who can successfully defend ownership, so in the absence of government,

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11 See infra notes 159-160.
12 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, bk. 3, ch. 13, at 6-7 (The Lawbook Exchange, LTD. 1996). This paper extensively relies on Sir William Blackstone’s Commentaries on the Laws of England to discern the state of property law in the common law as it existed when the Constitution was enacted. Blackstone’s legal commentaries have greatly influenced jurisprudence and legal commentary in the United States. Between 1787 and 1895, American courts quoted or referred to Blackstone more than any other writer. As of 1915, he was cited in about 10,000 cases. In 1999, the US Supreme Court recognized that Blackstone’s works were the “‘government authority of English law for the founding generation.’” BERNARD H. SEIGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT 2, 30 (Social Philosophy and Policy Foundation and by Transaction Publishers 2001).
13 Supra note 12, at 3-4.
property would still exist. We have collectively established government in part to arbitrate ownership disputes and enable us to secure possession over those things that we feel we rightfully possess. The government’s power serves to minimize the costs of defending property from other individuals, from other governments, and from other parts of the same government.

B. Constitutional Provisions

The government’s duty to protect private property from other branches of government is enshrined in the U.S. Constitution. The Fifth Amendment states that “no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Fourteenth Amendment prevents the states from “depriving any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Through the Fourteenth Amendment, the Fifth Amendment’s Takings Clause has also been applied to the States. If the states or the federal government fail to secure property for its citizens, they fail to provide due process of law.


15 Supra note 12 at 12-15. Adam Smith also wrote: “The first and chief end of every system of government is to maintain justice: to prevent the members of society from encroaching on one another’s property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property.” Adam Smith, The Wealth of Nations (1776). The government’s powers to protect property are thus seen as necessary to maintain order and prevent harm to others.

16 This case was decided on the basis of the Fourteenth Amendment only, subsequent Supreme Court decisions have cited Chicago for the proposition that Takings Clause applies to the states, e.g. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

17 Supra note 4.


20 Blackstone, supra note 12, bk. 2, ch. 23, at 379.


22 Supra note 21.
was to be meaningfully enforced, the government’s power to redefine the range of
interests included in the ownership of property was necessarily constrained by
constitutional limits.”29 The Court in Lake Tahoe v. Tahoe, also quoting Holmes,
recognized that “the natural tendency [is] to extend the qualification more and
more until at last private property disappeared.”30

Not all justices share this paradigm of constitutional interpretation. Justice
William Brennan argued that the meaning of the Constitution is unknowable, even
to the Framers, and that in any case the Constitution is irrelevant because it is the
product of “a world that is dead and gone.”28 This paper recognizes that the
Constitution is a legally binding contract between the people and its government,
and that judges must respect the plain words of the Constitution, natural reason,
and the original intent of its drafters to uphold their oath of office.39

C. Definition of Property

To determine the scope of the Fifth and Fourteenth Amendments, the word
“property” must be carefully defined. Property may be classified in three general
ways.34 An expansive definition of property includes “all a person’s legal rights,
of whatever description.”35 A second narrower definition of property refers only
to proprietary rights, which include a person’s land, moveable personal property,
shares, and debts due to him, but does not include such personal rights as life,
liberty, or reputation.34 A third definition, more narrow than the second, divides
proprietary rights into in rem and in personam, and considers only in rem rights as
property rights.31 In rem items include freehold and leasehold estates, patents,
and copyrights, while in personam refers to debt obligations and other contractual
benefits.24 The definition of property that truly matters is the one that the Framers
intended when they drafted the Bill of Rights.

Fortunately, the Framers left clues within the Constitutional text that point
to the appropriate definition of property. The Fifth Amendment lists property
separately from life and liberty, implying that property rights are narrower than
the sum of all an individual’s legal rights.27 Clearly, an overly expansive
definition of property would subsume all legal rights into property law, so
property must refer to proprietary rights rather than the composite of all personal
rights. The Constitution additionally provides that “no [s]tate shall . . . pass any .
. . law impairing the [o]bligation of [c]ontracts.”30 The Framers evidently
intended the Contracts Clause to protect in personam rights, implying that the
Fifth Amendment protect in rem rights only. Moreover, construing property
broadly to include all in personam interests would unduly fetter the government,
especially given the author’s broad construction of takings law in Section III.36

28 supra note 10, at 1014.
29 Lake Tahoe, supra note 8 at 326 citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415
(1922).
30 Lino A. Graglia, Judicial Activism on the Right: A Mistaken and Fatal Hope, LIBERTY,
PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 71 (Ellen Paul and Howard
Dickman eds., 1999).
31 The oath of office for federal judges is as follows: “I do solemnly swear or affirm, that
I will administer justice without respect to persons, and do equal right to the poor and to the rich,
and that I will faithfully and impartially discharge and perform all the duties incumbent on me,
according to the best of my abilities and understanding, agreeable to the constitution, and laws of
the United States. So help me God.” Judiciary Act of 1789, 1 Stat. 73 (1789).
33 Id.
34 Id.
35 Id.
36 Supra note 4.
37 U.S. CONST. art. I, § 10, cl 1.
38 But see Goldberg v. Kelly, 397 U.S. 254, 263 n. 8 (1970), in which the majority wrote
that “it may be realistic today to regard welfare entitlements as more like ‘property’ than a
‘gratuity.’” An expansion of property in this manner would require the government to pay
D. Scope of Private Property Rights

Having concluded that “property” in the Constitution refers to in rem property, the next task is to ascertain what rights to in rem property the Constitution protects. Blackstone defined property rights as the “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” Domination of property implies the right to exclude others from possession or enjoyment. The Supreme Court has written that “the right to exclude, so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation.” Property rights include the right to exchange the property for its “true and actual value” determined by willing buyers and sellers “in arm’s length transactions.” Property owners also have the right to any benefit from the property by selling, building, leasing, mortgaging, subdividing, and granting easements. If a government successfully overcomes the power of individuals to exercise these rights to property, then private property no longer exists within the effective jurisdiction of that government.

E. Limits to private property rights

While the Fifth Amendment protects property rights, it also limits private property rights in two ways. First, the Fifth Amendment grants the government to appropriate private property, albeit with just compensation. If the government awarded sufficient compensation to fairly restore the property owner to the position he would have been in had the government action not taken place, then there would be no net gain or loss to private property. Second, the government may only take private property for public use, and not for some patently private use. In *Kelo v. City of New London*, the Court wrote that “it has long been accepted that the sovereign may not take one person’s private property for the sole purpose of transferring it to another private party, even though the original owner is paid just compensation.” Unfortunately, the Supreme Court has created several doctrines that prevent landowners from obtaining compensation, particularly with respect to regulations designed to protect the environment against development. The following section describes each of those barriers.

III. Artificial Legal Doctrines that Bar Just Compensation

The Supreme Court has devised many barriers that operate to prevent property owners from receiving the compensation owed them under the Fifth Amendment. These barriers have been labeled the Public Interest Exception, Direct Physical Invasion Rule, the Total Deprivation Rule, the Investment-Backed Expectations Rule, and the Permanent Takings Rule. The courts have used each of these doctrines as tools to avoid paying landowners compensation when

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38 Supra note 12, at vol. III, bk. 2, ch. 1, pp. 2.
40 Id.
42 United States v. Craft, 535 U.S. 274, 284 (2002). See also C. Edwin Baker, *Disregarding the Concept of Property in Constitutional Law: The FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 47-48 (Nicholas Mercu & Warren J. Samuels eds., 1999) (including within the many bundles of rights inherent in property ownership the rights to relax, eat, sleep, and play, to invite others to engage in those activities, to prevent the government from taking property to build aesthetically atrocious structures, to give land or objects to another, or to sell or exchange the land).
property is taken for public use. Each of these doctrines have been disregarded or
overruled in various cases, but all of them must be overruled in the same case
before takings jurisprudence can be made clean.

A. The Public Interest Exception

Under the public interest exception, if the government’s purpose in
enacting the regulation is important enough, then owners of private property are
not entitled to compensation.42 For example, in Keystone Bituminous Coal Ass’n
v. DeBenedictis, coal companies purchased options from private landowners to
mine coal below the surface.43 When the coal companies began exercising those
options, Pennsylvania forbade subsurface mining that might cause subsistence in
the land supporting private structures. Writing for the Court, Justice Stevens
upheld the statute against a takings claim because the regulation’s purpose
“substantially advance[s] legitimate state interests” in “protect[ing] the public
interest in health, the environment, and the fiscal integrity of the area.”44 The
Court considered the state’s ostensible interest of preventing subsistence
sufficiently important to spare the landowners, including the state, the expense of
repurchasing the mineral rights they previously sold to the coal companies.45

It is understandable that the Supreme Court would employ the same public
interest test to analyze takings cases as it does to assess numerous other

43 Keystone, supra note 47.
44 Id. at 485.
45 Id. at 488. See also Agins v. Tiburon, 447 U.S. 255, 261 (1980) (upholding zoning
ordinances against a takings challenge “because the zoning ordinances substantially advance
legitimate governmental goals,” which included “protect[ing] the residents of Tiburon from the ill
effects of urbanization”).
46 Supra note 47, at 483-85.

constitutional issues, such as equal protection46 and freedom of speech.47
However, the public interest exception should not apply to takings analysis for
several reasons. The Fifth Amendment presupposes that the government action is
valid, except in the rare instances that the rationale for a government taking does
not satisfy the Public Purpose Clause, or is “so arbitrary or irrational as to violate
due process,” no matter how much compensation is paid.48 Justice Holmes wrote in
Pennsylvania Coal that a strong public desire to improve the public condition
is not enough to warrant achieving the desire by a shorter cut than the
constitutional way of paying for the change.49

The Fifth Amendment does not need a public interest exception because
even the most compelling public purpose imaginable need not trump the Fifth
Amendment. For example, threat of invasion is a truly compelling public
purpose. If the military needed to commandeer a privately-owned boat or factory
to repel an invasion, the government could compensate the landowner with bonds
equal to the value of the taken property and pay those bonds with interest after the
war. In fact, the Supreme Court has required the government to compensate
property owners in those very circumstances.50 Society at large benefits from
measures taken to protect against threats to the public order, so society at large

46 See e.g. Vacco v. Quill, 521 U.S. 793, 808, 809 (1997) (holding that New York statute
banning physician-assisted suicide did not violate the Equal Protection Clause because it served
important public interests).
47 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969) (holding that the statute
requiring Federal Communications Commission to in turn require licenses to air representative
community views was constitutional as a matter of “great public concern”).
50 United States v. Corts, 337 U.S. 325 (1949) (awarding compensation to the owner of a
boat used during World War II; United States v. General Motors Corp., 323 U.S. 373 (1945)
(awarding General Motors compensation for a factory used for the war effort).
should bear the costs, not those individuals unlucky enough to have their property taken in the public interest.57

Almost every government action has at least some legitimate public purpose, so the outcome of the public purpose test will either invariably favor the government or rely on the arbitrary discretion of the courts. The Supreme Court in Nollan admitted that the public interest exception is inherently arbitrary. The Court wrote, “Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ or what type of connect between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter.”58

The “legitimate government goals” test also does not consider that the Fifth Amendment functions as a constraint against government power. Under the Constitution, “the citizen stands before the law in a dual character, both as an individual and a member of society; that in the former status he has certain natural rights not surrendered to society, but reserved to himself and necessary to his pursuit of happiness, and which the law cannot take away…”59 If the public interest is deemed more important than individual rights, then the Constitution no longer protects individuals against the government. It is instructive that only three of the early state constitutions had a takings clause, and none had a compensation requirement.60 The Fifth Amendment shows a clear intent on the part of the Framers to remedy pre-revolutionary disrespect for private property.

The court has been quick to reject the public purpose test when the government has physically taken or intruded upon land. In United States v. Causby, the Supreme Court affirmed that low-flying military aircraft effected a compensable easement to the plaintiff’s property.61 In Loretto v. Teleprompter Manhattan CATV Corp., the Court held that the enforced permanent physical presence of a cable line on a residential building was a per se taking, “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”62 The Supreme Court has reserved the public interest exception for unwanted regulatory takings cases.

After years of tortured and contradictory reasoning, the Supreme Court finally, and unanimously, claimed to remove the public interest exception from takings jurisprudence in Lingle v. Chevron.63 In Lingle, the lower courts had held that the State of Hawai‘i’s rent caps on gas stations were an uncompensated regulatory taking of private property and violated the Fifth Amendment because the rent control statute did not substantially advance Hawai‘i’s asserted interest in controlling retail gasoline prices.64 The Supreme Court “conclude[d] that the ‘substantially advances’ formula . . . is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation.”65

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57 Supra note 54, at 537. In Lingle, the Court reasoned that the government ought not to “force[s] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole” (quoting Armstrong v. United States, 364 U.S. 40, 49 (1956)).
58 Nollan v. California Coastal Com., 483 U.S. 825, 834 (1987) (holding that the government must pay compensation to gain an easement for a public right of way across the plaintiff’s beachfront property).
61 United States v. Causby, 328 U.S. 256 (1946).
63 Supra note 54.
64 Id. at 532.
65 Id.
If the Supreme Court applies its unanimous holding in *Lingle* against the government, then property owners will have a much stronger case for receiving compensation for takings. If not, then *Lingle* will expose the truth that the Supreme Court intended the “substantially advances” test to benefit only the government, not property owners.

### B. Direct Physical Invasion Rule

Some early constitutional scholars assumed that only direct physical invasions or appropriations of property, not the indirect exercise of lawful power, could give rise to a takings claim. In *Legal Tender Cases*, the Court upheld the government’s power to regulate the value of currency against a request for compensation, reasoning that the Fifth Amendment “has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.” To justify its ruling, the Court cited policies that are unrelated to *in rem* property, such as tariffs, embargos, drafts, and declarations of war. Moreover, the Constitution gives Congress express authorization to regulate the value of money. The Court did not need to interpret the meaning of the Takings Clause to properly dispose of this case.

The plain meaning of the word “take” does not require the Court to conclude that “take” means only a direct appropriation. Blackstone defined property as the third absolute right “inherent in every Englishman… which

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67 *Id.*
68 *Id.*
69 U.S. CONST. art. I, sec. 8, cl. 5.
71 *Id.* at 83.
74 *Id.* at 83.
75 *Supra note 71,* at 110.
76 *The Federalist No. 83 (James Madison) available at* http://www.federalist.org/docs/fed83.htm. Madison wrote: “The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The...
Pennsylvania Coal abolished the rule that only direct physical invasions merit compensation. In Pennsylvania Coal, the Supreme Court ruled that a Pennsylvania statute preventing coal companies from mining coal despite their contracts with owners of surface rights violated the Contracts Clause and the Fifth Amendment’s Takings Clause, and that the state owed Pennsylvania Coal just compensation. The Court awarded compensation to the coal company despite the fact that the government merely prevented the company from mining its coal rather than physically confiscating the coal. The Court has since affirmed the Pennsylvania Coal holding in Dolan, Nolan, and Lucas.

The Court in Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency came close to reverting to the old rule that only direct physical appropriations could cause a taking. In Tahoe, the land use agency for the Lake Tahoe region secured a succession of court-enforced moratoria on development near the lake. The Supreme Court ruled for the government, reasoning that “a regulatory taking . . . does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.” Even though a moratorium on construction does not affect a landowner’s right to exclude others, the moratorium excludes the landowner. Few buy land simply to squat there, so preventing construction of a home is a constructive eviction. Just as landlords who fail to prevent flooding into a leased structure have been held liable for damages to the tenant on a theory of constructive eviction, so should the court have awarded damages in the form of “just compensation” to the owners of Lake Tahoe property subject to the moratoria.

C. The Total Deprivation Rule

Another barrier preventing constitutional analysis of a takings claim is the Supreme Court’s assertion that a taking is not a taking unless the government action deprives the landowner of all or almost all economically valuable use of the land. This doctrine has its origins in the concept that only a direct governmental appropriation or physical invasion could give rise to a takings claim. The Court has reversed itself repeatedly on this rule. Shortly after World War II, the Court in United States v. Petty Motor held that tenants in a condemned building were entitled to compensation for the remaining portion of their lease. In United States v. General Motors, the Court held that General Motors was entitled to the cost of diminution and depreciation in the value of fixtures and supplies, in addition to the partial taking of their leasehold.

The Supreme Court reversed course in Keystone, upholding against a claim for compensation a 1966 Pennsylvania law that generally required 50 percent of coal to remain in the ground if there was substantial risk of subsistence.

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51 Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that the City of Tigard’s efforts to exert an easement from a property owner for a public bike path required compensation).
52 Sera note 58.
53 Sera note 10, at 1014.
54 Sera note 5.
55 Id. at 306, 307.
56 Id. at 325, n. 19.
58 Keystone, supra note 47; Palazzolo, infra note 94.
59 Sera note 10, at 1014.
damage to surface structures. The Court affirmed the Total Deprivation Rule. The Court in Palazzolo v. Rhode Island denied compensation to a landowner barred from filling in wetlands on his property. Since he could build a $200,000 house on a small portion of the property rather than the intended 74-subdivision, he was not deprived of all economic value of the land.

The word “schizophrenic” best describes the Total Deprivation Rule. Revealing a bias against regulatory takings, the Court has disregarded the rule when analyzing actual physical takings. In Loretto, the Court ruled that requiring a landowner to place a cable system on private property was a taking, even though the regulation did not measurably reduce the value of the property. In 2001, the Court affirmed the Loretto rule that “[e]ven a minimal permanent physical occupation of real property requires compensation under the [Takings] Clause.” The Total Deprivation Rule has not been reciprocally applied to regulatory actions, even if the regulation causes far greater economic damage, as when the government deprived coal companies of their mineral deposits in Keystone.

The Total Deprivation Rule is also inconsistent with other areas of the law. In tort law, if a person wrongfully causes injury to another, the tortfeasor is required to pay all the costs necessary to restore the wronged party to his or her original condition. If tort law as applied to private parties requires full restitution, that same standard should apply to the government. The Total Deprivation Rule allows the government to evade compensation if it deprives a property owner of only part of the value of their property, which is equivalent to paying only partial damages to compensate for a complete deprivation. In Lucas, Justice Stevens criticized the “deprivation of all economically beneficial use” doctrine as “wholly arbitrary,” in that “[the] landowner whose property is diminished in value 95 percent recovers nothing,” while the landowner who suffers a complete elimination of value “receives the land’s full value.”

D. The Investment-Backed Expectations Rule

In Penn Central Transportation Co. v. New York City, the Supreme Court created the Investment-Backed Expectations Rule, holding that if a new real estate investor has some reason to suspect that a regulation will limit use of the land, the investor will pay a reduced price for the land, and therefore is not entitled to compensation for the value of the land as it was before the regulation took effect. In the Penn Central case, Grand Central Station was named a landmark site by New York City, preventing the owner, Penn Central, from constructing a skyscraper over the top of the station. The Court ruled that denial of the building permit was not a taking because Penn Central did not have a distinct investment-backed expectation of using the land in that particular manner.
The Investment-Backed Expectations Rule has several irredeemable flaws. The doctrine allows the government to successively erode rights to own property while grandfathering existing owners under the old property regime. Every time a person sells his or her land, the new owner is forced to take the land under the newer restrictive system. Existing landowners who do not need to sell their property have fewer incentives to sue over new land use restrictions. A potential purchaser could not sue the government before buying a property because he or she would lack standing without an injury-in-fact. The investment-backed expectations doctrine is like a Venus Fly Trap—investors wanting to enjoy the fruit of the property can enter the trap, but they cannot leave. Justice Holmes wrote in *Pennsylvania Coal*:

> When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The Investment-Backed Expectations Rule allows the government to gradually abolish the right of individuals to enjoy rights to their land.

The Investment-Backed Expectations Rule also rewards ignorance. A person who pays top dollar for real estate that might be rendered worthless by pending environmental legislation has investment-backed expectations to develop the land and might be protected. However, a knowledgeable investor who is aware of the land’s impending doom will pay a reduced price for the land and would not pass the Court’s investment-backed expectations test. Basing property rights on intent is fundamentally unsound. Instead, takings law should be based on an objective fact—ownership or non-ownership.

The Investment-Backed Expectations Rule is under stress. The *Palazzolo* majority wrote that “a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of time.” The majority believed that a regulation’s constitutionality does not rest on irrelevant factors such as time or successive owners. The doctrine’s days are numbered.

E. The Permanent Takings Rule

The Supreme Court has reversed itself repeatedly over the issue of whether a temporary deprivation of property is compensable. In *Petty Motor*, the Supreme Court ruled that the government must compensate tenants for their leasehold interest in condemned property. In the 1987 case *First English Evangelical Lutheran Church v. County of Los Angeles*, the Supreme Court awarded compensation to a church prevented by the county from rebuilding for several years after a flood. The Court reasoning that “temporary takings” which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. However, the Court has backtracked since *First English* and is now apparently unwilling to compensate for temporary takings of freeholds.

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107 *Supra* note 55, at 415.
108 *Supra* note 94.
110 *Supra* notes 91-92.
112 Id. at 318 (1987).
Lake Tahoe, the Court declined to compensate landowners for moratoria that prevented landowners from developing property for six years. Justice Stevens, in his dissent in Lucas, went so far as to say that the plaintiff suffered no injury-in-fact from the temporary statutory ban on construction.

In fact, Lucas, the Lake Tahoe landowners, and other similarly situated parties do suffer actual financial losses from temporary prohibitions on construction. All property has an implicit interest cost. The homeowner can either pay interest to the bank for the loan needed to finance the property, or else sell the property and invest the proceeds and earn interest. If the government forced a landowner to open up his land for rent-free use, a taking would surely be found because a physical invasion has taken place. However, the economic cost to the landowner, whether a physical invasion or a moratorium, is precisely the same. A moratorium on construction is equivalent to a forced rental, even if the land is undeveloped.

Collectively, these five legal artifices allow the courts to avoid confronting governmental abuses head-on. The Court has placed them in a "grab bag of principles, to be adopted where they support the Court’s theory, and ignored where they do not." Overturning statutes is sometimes considered judicial activism, but the job of the courts is to actively enforce the Constitution to protect the minority from governmental abuses.

IV. LEGITIMATE RATIONALE FOR TAKING PROPERTY WITHOUT COMPENSATION

Once the Supreme Court dispenses with artificial barriers to compensation, the Court will be able to seriously elucidate several legitimate doctrines to allow just compensation for a government taking while protecting the government’s freedom of action to perform critical responsibilities. The majority in Lucas recognized that government can only take property without compensation if the use taken by regulation was not part of the property owner’s rights to begin with. The Court identified two such categories: nuisances and other “background principles” of property law. Scholars writing on this topic have postulated that custom, public trust doctrine, and statutory law are “background principles” of property law that may legitimately abridge property rights. The author adds constitutional law to that list. This section will explain the roles that each of these takings exceptions play and how environmental law fits into those exceptions.

A. Custom Limiting Compensation

Blackstone’s Commentaries contains seven criteria for an enforceable customary right. A custom that supercedes property rights must be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent. The

\[\text{Supra note 10, at 1027.}\]
\[\text{Supra note 10.}\]
\[\text{Supra note 120, at 345, 346 (2002) (quoting I WILLIAM BLACKSTONE, COMMENTARIES 246-47 (Bernard C. Gavir ed., 1941)). This article references a similar definition of customary rights from HALSURY’S LAWS OF ENGLAND:}\]

To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to effect; (4) it must have continued as of right and without interruption since its immemorial origin.
“immemorial” requirement is the critical element. To Blackstone, “immemorial” meant “time out of mind.” Many American courts have ruled that the relatively short history of the United States precluded the existence of a customary right that trumps private property. The United States, lacking England’s long history, need not follow a “time-out-of-mind” standard. Logically, any qualified custom in the United States that trumps a person’s private property right must predate the award of the original land grant in question, or the date the Fifth Amendment came into effect against the state with jurisdiction over the property. Environmental regulations do not fall into the ambit of common law custom because of their recency, and because environmental harms have customarily been dealt with via the law of nuisance or trespass.

B. Public Trust Theory Limiting Compensation

The ancient laws of the Roman Emperor Justinian held that “[b]y the law of nature these things are common to all mankind: the air, running water, the sea, and consequently the shores of the sea.” The Magna Carta’s provision that fish-weirs be removed from all rivers in England limited the power of the sovereign to obstruct waterways and transferred this Roman rule into the English common law. Under the common law public trust doctrine, “the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public,” preserving “public rights of fishery, commerce, and navigation in these waters.” These principles became part of the common law of the United States in Illinois Central Railroad v. Illinois. The public trust doctrine results in the rule that the government cannot sell all rights to navigable lakes, rivers, and oceans without a legitimate public purpose.

Public trust theory is divisible into two categories—those principles that existed in common law at the time of the enactment of the Fifth Amendment, and the expansion of public trust doctrine since that time. Withholding compensation from landowners under the ancient public trust doctrine is fair because “landowners are on notice that they do not have takings claims when government protects navigable waters by limiting private use.” Accretions to public trust doctrine after the Fifth Amendment was written which vest the state with additional control of property that was previously in private hands should be
considered a compensable taking.\textsuperscript{132} In \textit{Phillips Petroleum Co. v. Mississippi}, the US Supreme Court allowed Mississippi to abolish fee simple titles dating back to pre-statehood Spanish land grants when it expanded the reach of public trust lands from submerged land beneath navigable waterways to lands subject to the ebb and flow of the tides.\textsuperscript{133} The Court wrote that “the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”\textsuperscript{134}

However, the Court rejected arguments that the landowners had paid property taxes on the land to Mississippi for 100 years,\textsuperscript{135} which is powerful evidence that the State of Mississippi freely traded land that it might have reserved for the public trust to the private sector in exchange for tax revenue. If a government sells rights to public trust land, then takes back those rights, the government should pay compensation. New additions to public trust doctrine after enactment of the Fifth Amendment are essentially repackaged versions of the public interest exception doctrine that unjustly avoids paying private property owners compensation.\textsuperscript{136} Unless a particular category of property is not reducible to private ownership or within the power of the government to vest the fee in private hands, “public trust doctrine” is synonymous to “public use.”

C. Statutory Law Limiting Compensation

\textsuperscript{132} See \textit{e.g.} In \textit{re Water Use Permit Applications}, 9 P.3d 409 (Haw. 2000) (expanding public trust doctrine to bring water resources in Hawai’i under the control of the state; Matthews v. Boy Head Improvement Ass’n, 471 A.2d 355 (N.J. 1984) (expanding public trust doctrine to include dry sand’s beaches).

\textsuperscript{133} 484 U.S. 469 (1988).

\textsuperscript{134} Id. at 475.

\textsuperscript{135} Id. at 382.

\textsuperscript{136} See supra Section III.A.

In \textit{Lucas}, the majority wrote that regulations prohibiting uses of private land do not require compensation if the regulation, not newly enacted, inherited to the title itself and became part of background principles that limit the very institution of land ownership.\textsuperscript{137} Such statutes must logically predate the government’s original grant of private property, as well as the date the Fifth Amendment became operable against the land of the jurisdiction in question. Since the federal government came into existence upon final ratification of the Constitution by New Hampshire on June 21, 1788,\textsuperscript{138} and since the Bill of Rights, containing the Fifth Amendment, took effect on December 15, 1791,\textsuperscript{139} any statutory law enacted between those dates that reserves to the public an interest in land would not require compensation. The federal government did not enact any such laws, environmental or otherwise, during this window of opportunity.\textsuperscript{140}

State laws enacted before the Fifth Amendment took effect against that state may also restrict title to private property without requiring compensation. For example, in Hawai’i, land titles contain numerous reservations to private property dating back to the award of the original land grants by the Kingdom of Hawai’i, including “all mineral or metallic mines,”\textsuperscript{141} the right of native Hawai’ians to gather certain materials,\textsuperscript{142} and the right to access natural springs and running water.\textsuperscript{143} States may legitimately enforce these statutes without

\textsuperscript{132} Supra note 10, at 1029.

\textsuperscript{133} The Avalon Project: Ratification of the Constitution by the State of New Hampshire, June 21, 1788, \url{http://www.yale.edu/lawweb/avalon/constnh.htm} (last visited Mar. 1, 2007).

\textsuperscript{134} Supra note 71, at 1.

\textsuperscript{135} STATUTES AT LARGE BY AUTHORITY OF CONGRESS (Dennis & Co., Inc. 1961).

\textsuperscript{136} In \textit{re Robinson}, 49 Haw. 479, 430 (1966).


running afoul of the Fifth Amendment. Ancient state law, however, is not a fertile source to justify recent environmental regulations.

D. Constitutional Background Principles Limiting Compensation

Private property rights, guaranteed under the Fifth Amendment, may also be abridged by other constitutional provisions. The Constitution itself must be a “background principle” that limits the scope of private property and compensation for takings. These powers over private property are considerable. Congress has the power to tax. 146 Congress has the power to coin money and determine its value, 147 which necessarily includes the power to devalue currency, and thus destroy the value of private bonds. The federal government has the power to enforce embargoes, 148 declare war, 149 and call up the draft. 148 Property owners are not entitled to compensation to the extent that these and other enumerated constitutional powers of the federal government reduce the value of their property. Since the Constitution is silent as to the environment, environmental laws, like all other laws, are subject to the Fifth Amendment.

E. Nuisance as a Background Principle

In Lucas, the majority wrote that the state may regulate a nuisance without paying compensation for a taking of private property. 149 Nuisance law is grounded on the Roman principle sic utere tuo, ut alienum non laedas, which means “use your property to not injure that of another.” 150 This maxim became the common law of England in 1611 through Aldred’s Case, which involved pollution. 151 Blackstone defined a nuisance as a “real injur[y] to a man’s land and tenements” that “works hurt, inconvenience, or damage.” 152 Blackstone’s Commentaries provide insight into the scope of the law of nuisance as it existed in the United States at the time the Fifth Amendment was enacted. 153 He gave numerous examples of actionable nuisances, including noxious smells and air pollution, physical intrusions into the property of another, excessive noise, blocking out the light entering an ancient building, water pollution, blocking the flow of water, and interfering with an easement. 154

The Supreme Court has consistently affirmed that the government may regulate nuisances without having to pay compensation. In Hadacheck v. Sebastian, the Court upheld a Los Angeles ordinance prohibiting operation of a brickyard within city limits in part because “fumes, gases, smoke, soot, steam and dust arising from petitioner’s brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity.” 155 In Miller v. Schoene, the Supreme Court upheld a statute allowing the state to order cedar

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146 U.S. Const. art. I, § 8, cl. 1.
147 U.S. Const. art. I, § 8, cl. 5.
149 U.S. Const. art. I, § 8, cl. 11.
150 S supra note 10, at 1014.
151 S supra note 151, at 216-18.
trees on private property be cut down without compensation to prevent a communicable plant disease from infecting nearby apple orchards. In *Lucas*, the majority affirmed the *Magnier* line of cases recognizing that the government has the power to prohibit "noxious" uses of property similar to "public nuisances" without having to pay compensation.157

Zoning law is based on the law of nuisance, attempting to preempt nuisances before they occur.158 The Supreme Court in *Euclid v. Ambler Realty Co.* reasoned that zoning ordinances are constitutional using nuisance law:

A zoning ordinance, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim sic utere tuo ut alienum non laedas, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power.159

Environmental regulations have the same preemptive rationale as zoning. They force potential polluters to seek alternative ways of doing business and uniformly penalize those who cause a nuisance.

E. Rationale of Nuisance as Touchstone of Takings Law

Of those "background principles," nuisance law has the greatest utility for properly analyzing the constitutionality of modern environmental laws. Justice

Kennedy argues in his concurrence in *Lucas* that the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society, and that the state should not be prevented from enacting new regulatory initiatives in response to changing conditions.160 Kennedy would certainly have a point if the law of nuisance were limited to Blackstone's examples.161 People continually invent new and creative nuisances. However, if the constitutional analysis of a law taking property without compensation were limited to the core nuisance principle of "using your property to injure that of another," nuisance analysis would be flexible enough to cope with changing times and circumstances. Justice Scalia offered the example of building a nuclear power plant on a fault line, a risk that did not exist before the invention of nuclear power.162 The courts should develop an objective set of criteria to determine whether a given use of land is a nuisance.

V. ELEMENTS FOR ANALYZING PURPORTED NUISANCES

Individual tastes and preferences vary greatly over whether a use of property is a nuisance.163 Unlike many other constitutional questions, the Supreme Court has declined to provide a test for parsing true nuisances from specious nuisances,164 preferring to grant the state unrestrained power to define

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156 Miller v. Schoene, 276 U.S. 272 (1928).
157 Supra note 10, at 1035.
158 Supra note 135.
159 Supra note 10, at 1028.
160 In *Lucas*, Justice Blackman wrote, "There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free." Once one abandons the level of generality of sic utere tuo ut alienum non laedas, one searches in vain, I think, for anything resembling a principle in the common law of nuisance. Id. at 1035 (Blackman, J., dissenting).
161 In *Euclid*, the Supreme Court in essence defined a nuisance as something that impinges "the public health, safety, morals, or general welfare." Such a vague definition.
nuisances. In Tahoe, the Court wrote, “[W]e have ‘generally eschewed’ any set formula for determining how far is too far, choosing instead to engage in ‘essentially ad hoc, factual inquiries.’” The power to curtail public nuisances is considered within the scope of the government’s police power. If the government, which wields the police power, is given license to define the scope of its own police power, then the government can act without restraint. In a legal system requiring compensation for taking private property, the government cannot have sole discretionary power to define what is or is not a nuisance. Without checks on government discretion, private property owners could not prevail against the power of the government to take their property. If the Supreme Court eliminates the artificial barriers to analysis of a takings claim, the Court will need to develop criteria to determine whether a given regulation properly counteracts a nuisance. The following is a set of criteria that the courts should use.

A nuisance must involve an injurious emission.

A nuisance requires something caused by the owner or agents to leave the owner’s property and enter the property of another. This article defines those collective things as “emissions.” Emissions take many forms. Air and water pollution are clearly emissions that result in a nuisance. In Huron Portland Cement Co. v. Detroit, the Supreme Court affirmed that “[l]egislation designed to particularly when it includes sweeping terms such as “general welfare,” is insufficient to limit governments or provide suitable guidance to local courts. Supra note 160, at 395.

See Hadacheck v. Sebastian, 293 U.S. 434, 438 (1935), rejecting a takings claim without seriously considering the strength of the City of Los Angeles’ claim that the brickyard was a nuisance.

Supra note 8. See also Tahoe, supra note 8, at 322 (quoting Penn Central, supra note 102, at 124).

Hadacheck, supra note 166, at 408.


free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . the police power.” In Potashnick Trust Service, Inc. v. Sikeston, a lower court found that operating a pig and cattle pen close to a residential area created nuisances in the form of smells, filth, and vermin, all of which are injurious emissions justifying a nuisance not eligible for compensation. Sound is also an emission because noise creates pressure waves in the atmosphere. If those pressure waves travel beyond the property line and interfere with the quiet enjoyment of others, those pressure waves are a nuisance. In State v. Turner, the court held that a bar owner was criminally liable for creating a nuisance because he “allowed noisy, drunken, and boisterous crowds at his establishment.”

This requirement of an emission excludes immoral conduct as a compensable nuisance under takings law. Examples of immoral conduct that have been considered a nuisance include gambling, obscenity and indecent exposure, illegal liquor, bullfighting, and public profanity. Such laws properly fall within the scope of the broader police power to regulate the moral

165 Huron, supra note 168.
166 Potashnick, supra note 168.
168 Info note 174.
172 Supra note 59; Brown v. Perkins, 78 Mass. 12 (Gray) 89 (1858).
173 State v. Carney, 207 Mo. 429, 165 S.W. 1078 (1914).
conduct of its citizens, as with criminal law. If property were defined broadly to include all of a person’s legal rights, immoral conduct would rightly be a nuisance under property law. To prevent property law from morphing beyond its proper bounds, nuisance law should concern only uses of in rem property.

Transient objects that pass through a property without being materially altered by the owner’s use of property are not nuisances either. If a sudden rainstorm causes a flood that travels across one property and into another, the owner of the property where the flood passed through is not liable unless the owner contributed to the flood or the ensuing destruction in some way. Simply creating an ugly building is not a nuisance under the requirement of an emission because the light that makes the building visible during the daytime is generated by the sun, not the building itself—the landowner did not generate an emission.

In *State ex rel. Stayanoff v. Berkeley*, the Supreme Court of Missouri upheld the City of Ladue’s denial of a building permit because the architectural board believed the triangular shape of the proposed design did not conform to the urbane Colonial, Tudor English, and French Provincial houses already in the neighborhood. William Blackstone averred that “depriving one of a mere matter of pleasure . . . by building a wall or the like . . . is not an actionable nuisance.”

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178 *Warner Elektra/Adamic Corp. v. County of DuPage*, 993 F.2d 1280 (1993) (holding the county partially liable for flooding to a warehouse caused by poor drainage near a public road);

180 *Unireal, Inc. v. Hood*, 588 F.2d 454 (1979) (upholding a ruling that a warehouse owner was not liable to the tenant for flood damage because the flood was the result of extraordinary climatic conditions).


Many environmental laws that prevent development are founded on aesthetic tastes. For example, the Endangered Species Acts protect the aesthetic tastes of those who prefer watching Sandhill Cranes frolic in marshy grasslands at the expense of those who enjoy watching SUVs zoom down interstate freeways. Wetlands protection provisions in the Clean Water Act are designed to protect the scenic beauty and biodiversity of swampy marshland.

Aesthetic regulations that take private property without compensation unfairly reduce the financial risk of existing property owners by dampening new construction. Purchasing the fee of a property with the intention to rent is equivalent to purchasing a business. A person who invests in property valuable for its beauty, like beach-front property, faces the business risk that some other property owner will build on adjacent land and diminish the property’s natural aesthetic value. Every fee owner faces an inherent risk that a person with different aesthetics will use neighboring land in an aesthetically displeasing way, such as erecting a large American flag, as Donald Trump did in Palm Beach, Florida. Aesthetic regulations burden new private property owners for the benefit of incumbents, intervening to remove a natural and inherent risk in owning real estate.

The desire to lock in the aesthetic and environmental quality of surrounding land also helps existing property owners prevent large new housing developments, which are far more financially harmful to incumbent landowners.

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than aesthetics. Construction of thousands of new homes puts downward pressure on the market level of rent, reducing the future rental income that preexisting property owners might otherwise expect. Rather than using the power of the police to force neighbors to conform to one’s person aesthetic values, neighbors should contract to forbid unesthetic uses of property through easements or covenants, or else pay compensation through the government for a taking.

B. Failure to perform some affirmative act is not a nuisance.

For a nuisance to occur, the property owner must actively do something to generate a harm or risk of harm to another person beyond his or her property. Perfect inactivity cannot be a nuisance. The government should pay takings costs for health and safety regulations of private property if those regulations are applied against a property owner who does not invite other people to enter his property or represent to guests that his property is safe or sanitary. However, as soon as he invites someone else onto the property, or allows others to believe they can freely enter the property, then he has a natural duty to disclose the ways in which the property or structure does not comply with community standards. A person who buys a tract of land, then constructs a rickety shack without providing for running water, electricity, and other conveniences, has not created a nuisance that might harm anyone else. Some are annoyed by the fact that a few members of society do not live up to high standards of cleanliness, fastidiousness, safety, and order, but the lack of such standards is not a nuisance.

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186 See e.g., Sunborn v. McLain, 233 Mich. 227 (1926) (upholding a covenant that worked to bar construction of a gas station in a residential area).

187 Wis. Stat. § 66.05(8)(c)(d) provides:

Any building, which under par. (a) either as a result of vandalism or for any other reason is permitted to deteriorate or become dilapidated or blighted to the extent where windows, doors or other openings or plumbing or heating fixtures or facilities or appurtenances of such building, dwelling or structure are either damaged, destroyed or removed to that such building, dwelling or

188 Supra note 22.

189 Id. at 370.

190 Id. at 391.

191 Id. at 385.

192 See id.
its appraised value, as required by Wisconsin statute.\textsuperscript{139} The Wisconsin Supreme Court properly ruled that the razing order exceeded the state’s authority where the building was no longer used as a barber shop or a law office, and was several blocks from any other structure.\textsuperscript{140} Many other jurisdictions have not adopted the hands-off approach of \textit{Donley}. \textit{In City and County of San Francisco v. Municipal Court}, a California appeals court upheld a city ordinance that required intrusive inspection and condemnation of private residences because the public had a legitimate interest in preventing deterioration of urban neighborhoods.\textsuperscript{141} City ordinances should be presumptively unconstitutional if they require the owner to perform some affirmative act, rather than merely requiring adequate disclosure to outsiders or potential tenants who enter the private property. Failure to build plumbing in a house is not a nuisance, particularly since many houses constructed at the time the Fifth Amendment was enacted did not have plumbing that satisfy modern standards, including the original White House.\textsuperscript{142} Certainly, many building code regulations do legitimately reduce the risk of real harm to the property of others.

\textit{In Pucci v. Algiere}, the court rightly ordered a building demolished where the roof was a fire hazard, which has the potential to harm neighboring property.\textsuperscript{143} “A man’s home is his castle”\textsuperscript{144}—the public is not harmed if the castle is dilapidated. The constitutionality of zoning and building codes should turn on the potential harm to others, not the harm to the property owner.

\textbf{C. \quad Outright prohibitions on uses of property necessary for survival should be subject to strict scrutiny.}

Prohibiting a use of property necessary for survival, such as building shelters or growing crops, should presumptively be considered a taking. Any regulation that prevents construction of a house or a farm without also providing for compensation should be held to the same exacting standards of strict scrutiny now applied to public race-based discrimination.\textsuperscript{145} This rule recognizes that survival is the original and ultimate purpose of privately-held property, as well the reason why governments exist at all.\textsuperscript{146} Blackstone, wrote, “Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a sorest, and men have been mere animals of prey, which, according to some philosophers, is the genuine state of nature.”\textsuperscript{147} Without income-producing property, whether a wilderness containing wild deer or a marketable patent to intellectual property, we cannot earn food. If private ownership of property is abolished, people die on a massive scale.\textsuperscript{148}

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\textsuperscript{139} And the law of England has so particular and tender a regard to the immunities of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity ... \textit{5 William Blackstone, Commentaries on the Laws of England, bk. 4, ch. 16, at 223 (The Lawbook Exchange, LTD. 1996).}
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\textsuperscript{141} infra note 200.
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\textsuperscript{143} Donley v. Bontieher, 79 Wis.2d 393, 396, 397 (1977).
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\textsuperscript{144} Id. at 399.
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\textsuperscript{145} City and County of San Francisco v. Municipal Court, 167 Cal. App. 2d 712 (1985).
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\textsuperscript{146} The early White House had no indoor plumbing—water had to be hauled from Franklin Park, five blocks away. White House Plumbing. \textit{http://www.theplumber.com/white.html} (last visited Mar. 1, 2007).
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such an outcome on the individual or the societal level is of such overriding importance that strict scrutiny should attach to gauge whether a government action preventing property owners from producing food or shelter legitimately averts a bona fide nuisance.

D. Regulations prohibiting nuisances must not be selectively applied.

The Supreme Court has held that if an otherwise lawful ordinance is enforced in a discriminatory manner, the ordinance may be invalidated as a violation of due process. 204 All true nuisances, whether new or pre-existing, should be subject to the same rule of law. In *Spur Industries, Inc. v. Del E. Webb Development Co.*, the Arizona Supreme Court held that a cattle feedlot was a nuisance, even though the feedlot was in service for nine years before urban growth from a nearby town began enveloping the property. 205 This result is fair. With population growing exponentially at 1 percent per year, 206 noxious uses of land built outside cities gradually become enveloped. The government must eventually forbid noxious uses of property, even if those uses were appropriate at their location for decades.

Grandfathering preexisting uses of property in a regulation is a powerful indication that the use of property being forbidden is not really a nuisance. In *Lucas*, the property owner purchased two vacant lots next door to other completed homes. 207 If building a home on that island were really a nuisance, South Carolina would not have hesitated to force all the other property owners to vacate their land and demolish their homes. Instead, the state placed a moratorium on new development that burdened Lucas and benefited his neighbors. Likewise, in *Lake Tahoe*, the moratoria applied only to new development, not pre-existing homes. 208 If water clarity were truly a bona fide public nuisance, and if the presence of structures in the Lake Tahoe basin were truly a significant factor in the reduction of clarity, and if clarity really were a reasonable concern, regulators would not hesitate to demolish the multimillion-dollar mansions, 209 golf courses, 210 casinos, 211 and resorts 212 in the Lake Tahoe basin without paying a dime of compensation. The Supreme Court’s selective application of the law denied just compensation to newcomers in Lake Tahoe.

E. Constitutional amendments may modify the law of nuisance.

Good sanitation, electricity, running water, safety provisions, and other living standards are nice to have, but governments cannot justify uncompensated intrusions upon private property to secure those living standards without a federal constitutional amendment allowing such an intrusion. The Federal Constitution contains no such standard that might trump the Fifth Amendment. Some state constitutions do have such provisions. 213 For example, Hawai’i’s constitution

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207 supra note 10, at 1068.
212 See e.g. Ill. Const. art. XI (2006): “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.” Penn. Const. art. 1 § 27 (2006) (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”).
gives the state the power to clear slums and rehabilitate substandard areas. 212 Plan and manage development, 213 “provide for public sightliness and physical good order,” 214 and “promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State’s resources.” 215 These provisions, particularly the environmental provision, may legitimately quash Hawai‘i’s own constitutional requirement for just compensation, 216 subject to the Takings Clause of the federal Constitution.

VI. APPLICATION OF NUISANCE FACTORS

This section employs the five nuisance considerations of the previous section to determine whether the Endangered Species Act (ESA) regulates nuisances and should be enforced without the need to pay just compensation under the Fifth Amendment. In 1973, Congress enacted the ESA to preserve the “esthetic, ecological, educational, historical, recreational, and scientific value of endangered species for the Nation and its people.” 217 The ESA works two forms of takings of private property. First, the ESA provides that no person may “take” an endangered species, defining “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 218 Those who “knowingly” take an endangered species face a $25,000 civil penalty.

Second, after passage of the ESA, the Secretary of the Interior promulgated a regulation defining “take” as including “significant habitat modification or degradation where it actually kills or injures wildlife,” 219 and the U.S. Supreme Court upheld this interpretation in Babbitt v. Sweet Home Chapter of Communities for Greater Or. 220 Despite provisions in the ESA allowing the federal government to purchase habitat with appropriated funds, 221 the government has used the Endangered Species Act to prevent private property owners from developing their property without paying compensation. 222 In Nat’l Ass’n of Home Builders v. Babbitt, the D.C. Circuit Court prohibited construction of a new hospital to protect the habitat of the Delta Sands Flower-Loving Fly. 223

The ESA’s criminal penalty for the taking of animals contradicts the common law rule that landowners who find wild animals on their property and reduce the animals to their possession obtain ownership over the animals. 224 Blackstone wrote:

[T]here are some few things, which . . . must still unavoidably remain in common. . . . such also are the generality of those animals which are said to be ferre nature, or of a wild and untameable disposition; which any man may seize upon and keep for his own use or pleasure. All these things, so long as they

remain in possession, every man has a right to seize and enjoy them afterwards.\textsuperscript{225} The Supreme Court confirmed Blackstone’s rule in \textit{Hughes v. Oklahoma}, writing that “[n]either the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to [wild fish, birds, or animals] until they are reduced to possession by skillful capture.”\textsuperscript{226} If Blackstone’s rule properly reflects the Framers’ understanding of property law, then an endangered animal that enters private property and is captured by the landowner becomes private property, and the Endangered Species Act’s criminal prohibition against capturing or collecting the endangered species is unconstitutional.

The stated goals of the ESA do not concern customary rights, public trust navigable waters, or constitutional rights, or nor was the ESA a statutory law inuring to title before operation of the Fifth Amendment.\textsuperscript{227} Therefore, courts should determine whether taking an endangered species on private property is a nuisance. If an endangered Delhi Sands Flower-Loving Fly alighted on a landowner’s kitchen table, and the landowner squashed the Delhi Sands Flower-Loving Fly with a flyswatter, the landowner has not created an emission. If his property were encased in a giant plastic bubble, his actions would not cause anything to pierce that bubble other than an offense to the aesthetic sensibilities of those who value biodiversity. In the \textit{Home Builders} case, the ESA effectuated a moratorium on construction of a hospital.\textsuperscript{228} As hospitals are necessary for survival, the courts should have no trouble applying strict scrutiny to government claims that the ESA prevents nuisances. The ESA does pass the “affirmative act” test—the ESA prohibits actions that result in a “taking” of an endangered species. However, the ESA is selectively applied in that prohibition against “habitat modification” prohibits new construction while allowing existing structures within critical habitat to remain. This inconsistency is evidence that the underlying goals of the ESA do not relate to a nuisance.

This constitutional analysis of the ESA reveals that the government should pay compensation to private landowners if the government prohibits takings of endangered species or prevents habitat modification. The government can advance the goals of the ESA without violating the Fifth Amendment. First, the government could fence its public lands to prevent endangered species from entering private land, just as ranchers must prevent cattle from straying through broken fences.\textsuperscript{229} Second, the government could ensure that certain endangered species are preserved in zoos. Third, the government can purchase private land for habitat preservation purposes, as the ESA already provides.\textsuperscript{230} These measures would avoid forcing private landowners to subsidize the conservation desires of others.

\textbf{VI. CONCLUSION}

Under this construction of the Fifth Amendment, the Endangered Species Act is not \textit{per se} unconstitutional by virtue of its public purpose, as long as criminal liability for a taking of endangered species is not applied to private

\textsuperscript{225} Super note 200, at 13-14.
\textsuperscript{226} Hughes v. Oklahoma, 441 U.S. 322 (1979).
\textsuperscript{227} Super note 219.
\textsuperscript{228} Super note 223.
\textsuperscript{229} Union P. R. Co. v. Schwend, 13 Neb. 478, 481 (1882).
property. Because the ESA's express purpose is not to prevent a nuisance, the government is constitutionally obligated to pay compensation for any taking of private property. Even if the federal government drastically increased expenditures to pay for takings, the total economic cost of the regulations would remain unchanged. A taking of private property for public use without compensation is essentially an off-balance sheet tax assessment against the property owner to pay for a public program. The hidden nature of the tax prevents the government and the taxpayers at large from internalizing the true cost of the ESA. The Fish & Wildlife Service estimated that federal and state governments expended $610.3 million during the 1998-2000 fiscal years. However, the Pacific Legal Foundation and the Property and Environmental Research Center estimated that private and public ESA compliance costs easily reach $3.5 billion per year.

In *Pennsylvania Coal*, Justice Holmes wrote that "the government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." If nuisance law were permitted to define whether a government regulation impinging private property requires compensation, government expenditures for takings compensation would have to dramatically increase. Government would then have to repeal or reduce the enforcement of environmental laws. Restricting the definition of property to *in rem* property serves to limit the potential of this proposed framework to overturn thousands of regulations governing so many aspects of our lives. Many regulations that do not touch and concern *in rem* property would be spared from the Fifth Amendment's Compensation Clause.

The Supreme Court's unwillingness to defend property owners against government abuses of power perhaps explains its willingness to erect artificial and arbitrary barriers to property owners seeking relief, which include the Public Interest Exception, Direct Physical Invasion Rule, the Total Deprivation Rule, the Investment-Backed Expectations Rule, and the Permanent Takings Rule. These rules, lacking textual support in the Constitution, have allowed the government to prevent thousands of people from using their land for reasons as specious as the Delhi Sands Flower-Loving Fly or a few feet of water clarity. The Supreme Court has periodically rejected and affirmed each of these rules, making takings law muddled and confusing.

A consistent application of the Fifth Amendment's Compensation Clause would ensure that social goals such as conservation really are in the nation's best interest. If using land in a particular way really were socially, economically, or environmentally destructive, then the rest of society would have no trouble raising the funds needed to compensate the landowner for the lost opportunity cost of

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231 supra notes 225-27. The Endangered Species Act may have other constitutional infirmities, such a weak nexus to interstate commerce under Article I, Section 8 of the Constitution.
233 *Id*
234 supra note 55, at 413.
construction. Requiring a taking for certain environmental laws serves an excellent public good by providing an incentive for excellent scientific research. It would encourage environmentalists to make a sound, coherent argument for why a particular use of land harms the interests of society. It would provide a natural incentive for the government to conduct better cost-benefit analyses to determine whether a given harm really is worth the price of purchasing land to further environmental protection. Without budgetary limitations, the Fish & Wildlife Service can declare vast tracts of private land as "critical habitat" while only going through the motions to assess the economic impact. With budgetary limitations, the government would have a far greater incentive to use its limited resources to maximum effect.

Requiring compensation for takings of property resulting from the ESA would also reveal the full economic costs of conservation and allow society to weigh environmental issues against other pressing social concerns. For example, 46 million people lack health insurance. By preventing development, governments have reduced their tax base and limited tax receipts available for other priorities. Unfortunately, environmental compliance costs remain hidden.

With additional turnover on the Supreme Court, a new majority might holistically assess takings jurisprudence and conclude that nuisance law and other background principles of property law should determine whether regulatory

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128 Supra note 103. Supra note 120, at 341.

129 Supra note 8, at 322 (2002) (quoting Penn Central, supra note 102, at 124.

130 Supra note 3.